Supreme Court, U.S.
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No. 04 224

In The

Supreme Court of the United States

JOHN P. BEVINGTON,

PETITIONER, PRO SE

v.

OHIO UNIVERSITY, DR. ROBERT GLIDDEN
DR. JAMES ANDREWS, DR. STEVE HAYS,
DR. WILLIAM OWENS, KATHY FAHEY,

RESPONDENTS

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Court of Appeals for the Sixth Circuit denied the Petitioner due process.

2) Whether the Court of Appeals for the Sixth Circuit improperly ruled on the Respondent's Motion to Dismiss before discovery was finished, and while the Respondent was delaying discovery.

3) Whether the Respondent was in violation of Title 18, United States Code, §1621. Providing false information to the Petitioner and to the Court of Appeals for the Sixth Circuit.

4) Whether the Court of Appeals for the Sixth Circuit erred when it failed to address the Breach of Contract Issue.

5) Whether the Court of Appeals for the Sixth Circuit erred when it ruled that the Petitioner does not have a private right of action.

6) Whether the Court of Appeals for the Sixth Circuit has subject matter jurisdiction with respect to Respondent Ohio University and the other Respondents.

7) Whether the Court of Appeals for the Sixth Circuit erred when it ruled for the Respondent's motion to dismiss because States are not subject to the Americans with Disabilities Act. And whether the Court of Appeals for the Sixth Circuit erred when it failed to address the individual Respondents: Dr. Robert Glidden, Dr. James Andrews, Dr. Steve Hays, Dr.

William Owens, and Kathy Fahey who are not immune from liability under the eleventh amendment.

8) Whether the Petitioner's Complaint states a claim upon which relief can be granted.

9) Whether the court erred when it denied the Petitioner's Motion for Judgment by Default and Response to Respondents Answer and Jury Demand filed on Nov. 26, 2002.

10) Whether the court erred when it denied the Petitioner's Motion for Default Judgment and Petitioner's Request for a Protective Order filed on February 7, 2003, and March 3, 2003.

11) Whether the court erred when it sanctioned the Petitioner per the order dated April 20, 2003.

PARTIES TO THE PROCEEDING

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No.

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DR. WILLIAM OWENS, KATHY FAHEY,

RESPONDENTS

On Petition For Writ Of Certiorari

To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner request that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The U S District Court for the Southern District of Ohio Eastern Division General Order on Settlement Week (App. 1-4); and Jan. 9, 2003 Default Denial Order (App. 7-8); and Sanction Order (App. 9); and Preliminary Pretrial Order (App. 10-12); and Dismissed Order (App. 13-15) and Order to Show Cause for Frivolous Motion (App. 16-17) are reproduced. The U S District Court for the Northern District of Ohio Order of Transfer (App. 5-6) is reproduced. The opinion of the United States Court of Appeals for the Sixth Circuit order filed March 18, 2004 (App. 18-20), is reproduced.

JURISDICTION

On March 18, 2004 the United States Court of Appeals for the Sixth Circuit affirmed the district courts judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit. The United States Supreme Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. Section 1291 and Section 1295.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are: American with Disabilities Act (ADA); Breach of Contract; FERPA; Section 504 of the Rehabilitation Act of 1973; Title 18 U.S.C., §1621; Title 20 U.S.C., §1232(g); Title 28 U.S.C., §1291 and §1295; Title 42 U.S.C., Chapter 21, Subchapter IV, Section 2000c-8, Eleventh Amendment, Fourteenth Amendment.

STATEMENT OF THE CASE

On September 19, 2002 Petitioner John P. Bevington filed a complaint in the Federal District Court for Northern Ohio. The complaint indicated a failure to comply with FERPA, 20U.S.C. § 1232(g), failed to comply with section 504 of the Rehabilitation Act and Breach of contract.

On May 30, 2003 the Respondent presented a Motion to Dismiss. In the June 25, 2003 ruling to this motion, the Honorable Judge George C. Smith stated, "There is no private right of action under FERPA", sighting Gonzaga University v. Doe, 536 U. S. 273, 287 (2002). Judge Smith further ruled that Ohio University is a State Institution and as such is not subject to liability to the Americans with Disabilities Act. Judge Smith sighted the Board of Trustees of the University Of Alabama v. Garrett, 531 U. S. 356-67, and 374 (2001). Because of these rulings, the motion was granted (App. 13-15).

On September 15, 2003 the Petitioner appealed the June 25, 2003 ruling made by The United States District Court For The Southern District Of Ohio.

On March 18, 2004 The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment under Rule 34(j)(2)(C), Rules of the Sixth Circuit. The Sixth Circuit stated that "Bevington's RA claim was properly dismissed because the complaint failed to allege a claim for relief under the RA." Furthermore, this court stated that "The alleged discriminatory actions were taken against all students enrolled in the Latin classes at issue, not just Bevington." (App. 18-21)

REASONS FOR GRANTING THE PETITION

1) Whether the Court of Appeals for the Sixth Circuit denied the Petitioner due process.

The Sixth Circuit's ruling denies the Petitioner due process contrary to the Fourteenth Amendment. The Northern District Court would not permit motions filed by the Petitioner due to the fact that the Petitioner filed pro se and is handicapped. The Sixth Circuit's sighting of the Eleventh Amendment denies the Petitioner the right to due process. Giving immunity to the Respondents makes it impossible to file a complaint under any law, rules, constitutional and statutory provisions. The Sixth Circuits ruling that no discrimination occurred because all of the students enrolled in the Latin classes at issue were discriminated against is in contradiction to the definition of the word "discriminated". One cannot discriminate against "all" in a group; one can only discriminate against a person or a subgroup of that group. Redefining words, in this case discrimination, denies Petitioners right to due process.

2) Whether the Court of Appeals for the Sixth Circuit improperly ruled on the Respondent's Motion to Dismiss before discovery was finished, and while the Respondent was delaying discovery.

In the Preliminary Pretrial Order, it was ordered that all discovery must be completed by October 1, 2003 (App. 1-3 & 10-12). As pointed out in the Petitioner's Response to Respondents' Motion to Dismiss, this was filed May 30, 2003 and as such premature. In Respondents' Motion to Dismiss, the Respondents cited Fed. R. Civ. P. 12(b)(6). According to Rule 12(b) of the Federal Rules of Civil Procedure and Rule 56(c), which indicates that a Judgment can only be made if the pleadings, depositions, answers to the interrogatories, and admissions show there are no issues. The discovery was not completed; therefore, a Judgment on the motion cannot be made. The moving party delayed the

answers to the interrogatories and Respondent knew that depositions were not completed prior to Respondents' Motion to Dismiss. Therefore, the moving party is not entitled to a judgment. The Petitioner cites Rule 56 (f):

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make other such order as is just.

This fact was pointed out in the Petitioner's Response to Respondents' Motion to Dismiss on page 1 and 2, stating:

> To date, the Respondents' attorney Andrew Mollica has failed to cooperate by not providing all discoverable information as requested by the Petitioner. Additionally, Mollica has not stated cause for the delay.

Again, if the moving party has delayed the answers to the interrogatories, and the motion was filed knowing that depositions have not been completed and discovery is still in process then the moving party is not entitled to a judgment. In fact, the Petitioner was not given an opportunity to submit discovery in the form of a deposition that was obtained after the Respondent filed a Motion to Dismiss. The Petitioner intended to use this deposition to show that the statements made by the Respondent during the deposition were not consistent with some of the Respondent's replies on Petitioners Request for Admissions. Furthermore, during the

deposition held on June 23, 2003 some of the Respondents statements were not consistent with the statements in the interrogatories. As a result, it was not possible for the Petitioner to include this information in Petitioners' Response to Respondents' Motion to Dismiss. Furthermore, in this courts ruling in Herrada v. City of Detroit 275 f.3d 553 (6th CIR.2001):

II. ANALYSIS

A. Standard of review

A district court's dismissal of a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed de novo. **Jackson v. City of Columbus**, 194 F.3d 737, 745 (6th Cir. 1999). When considering a motion to dismiss, "the court must construe the complaint in a light most favorable to the Petitioner, and accept all of the factual allegations as true." **Id.** (citation omitted). "A motion to dismiss under Rule 12(b)(6) should not be granted 'unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim which would entitle him to relief.'" **Buchanan v. Apfel**, 249 F.3d 485, 488 (6th Cir. 2001) (quoting **Conley v. Gibson**, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)); **see also Jackson**, 194 F.3d at 745 (noting that dismissal is proper only "if it is clear that [**7] no relief could be granted under any set of facts that [***5] could be proved consistent with the allegations") (citation omitted).

This ruling indicates that a motion to dismiss should not be granted unless it appears beyond doubt that the Petitioner can prove no set of facts in support of his claim. The Respondent delayed the discovery process and submitted a motion to dismiss knowing that discovery was not completed. Therefore, the motion to dismiss should have been denied.

3) Whether the Respondent was in violation of Title 18, United States Code, §1621. Providing false information to the Petitioner and to the Court of Appeals for the Sixth Circuit.

The Respondents are in Violation of Title 18, United States Code; § 1621 makes it a crime to commit perjury:

> Section 1621. Perjury generally:
> Whoever –
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to suck oath states or subscribes any material matter which he does not believe to be true; or
>
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise

> expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

The Respondent participated in deception and evasion including false and conflicting information given, under oath, to the court and the Petitioner by the Respondent. As such, the Respondent was guilty of perjury and obstructing justice.

In the original complaint against the Respondents, the Petitioner stated several charges against Ohio University and certain personnel. Some of these charges included:

1. Dr. James Andrews informed Dr. Hays That I was Dyslexic. Sharing personal and confidential information without the consent of the person is contrary to Section 504, FERPA, and ADA.

2. Dr. Hayes refused to accept the disability letter of accommodations Dr. Steven Hayes changed the Final exam for Latin 112 to include chapters 15-28 instead of 19-28 as outlined in the Syllabus.

3. Dr. Steven Hayes named an error after the Petitioner.

In Mr. Mollicas' response the Respondents denied all these charges and several others. The Petitioner gave the Respondents an additional chance to consider these charges during the discovery phase. In the request for admissions, the Petitioner asked the Respondent to admit:

7. That Dr. Steven Hayes refused to accept the disability documentation for Latin 112 and 113.

   Response: Deny

8. That Dr. James Andrews informed Dr. Steven Hays of John's disability prior to John's notice of disability to Dr. Hayes.

   Response: Deny

12. That Dr. Steven Hays named a mistake after John Bevington and humiliated John Bevington in classes, Latin 112 and 113, on numerous occasions.

    Response: Deny

14. That Dr. Steven Hays changed the final for Latin 112 to include Chapters 15-28 instead of chapters 19 through 28 as outlined on the Latin 112 and 113 syllabuses.

    Response: Admit that there was some deviation from the syllabus to the final exam.

    Note: This response was different from the original denial Respondents Response.

Because the Petitioner still had the original signed Disability Letter of Accommodations, the Petitioner had evidence to

show that Dr. Steven Hayes refused to accept this letter even though the Respondent had denied doing so twice. On June 13, 2003 the Petitioner deposed Dr. Steven Hayes and Dr. William Owens. Dr. Steven Hayes' responses during the deposition were not consistent with the responses on the Petitioner's Request for Discoveries document. During the June 13, 2003 deposition, Dr. Steven Hayes was asked if he assisted in completing the interrogatories including the request for admissions (Dr. Hayes Disposition, Page 5, Line 16-21). Dr. Hayes replied, "I know nothing about the Interrogatories." (Id. page 5, line 22). Furthermore, Dr. Hayes stated that he did not know they existed until today (Id. page 6, lines 3-5). It would be reasonable to conclude that Dr. Hays would have been consulted to answer the interrogatories and the admissions that involved him. Since many of the interrogatory questions and admissions involved Dr. Hayes, Mr. Mollica and the General Counsel Mr. John Burns are guilty of dereliction of duty if Dr. Hayes was not involved in answering the Interrogatories.

Dr. Hayes admitted to discussing Petitioner's Learning Disability with Dr. Andrews (Id. page 6, lines 10-24 and Id. page 7 lines 6). Dr. Hayes indicates (Id. page 7, line 9) that he did not know documents existed about learning disabilities (referring to the disability letter of accommodations) but on (Id. page 8, lines 7& 8) he states, "I've seen that basic letter many times". The Petitioner asked Dr. Hayes on (Id. page7, line18-20), "I asked for the Defense to admit that you did not accept the letter, the accommodations letter, when presented to you. Is that your denial?" Dr. Hayes on (Id. page 7 line 21-24 and Id. page 8 line 1-20) first denies this and then admits that he really didn't accept the accommodations letter because he did not need to.

Dr. Hayes was asked if he named a mistake after Mr. Bevington (Id. page 9, line 11-13). Dr. Hayes' response was

(Id. page 9, line14-15), "No, I don't deny that. I think they may have misspoken that. Let me explain."

When asked about changing the chapter requirements for the final on Latin 112. Dr. Hayes admitted this, with the explanation that more chapters would make the test easier (Id. page 12 line 8-19).

On June 25, 2003 Mr. Mollica finally responded to several verbal requests and answered the last of the interrogatories. Mr. Mollica also delayed disclosing the verification page until June 25, 2003. This verification page was signed by John Burns, General Council, indicating that all of the foregoing interrogatories are true. The Respondent was well aware that Dr. Hayes' testimony in the June 13, 2003 deposition conflicted with the admissions and responses to interrogatories requested earlier. Either the admissions are untrue or the testimony in the deposition is untrue. Mr. Burns Signed a verification page and Mr. Mollica forwarded it to the Petitioner knowing that responses made in the admissions were not consistent with responses obtained during the deposition.

The Petitioner also submitted a motion for Default Judgment on February 7, 2003. The Petitioner claimed that the Respondents' Lawyer Mr. Mollica refused to be involved in the negotiation of a settlement. Mr. Mollica Indicated that Mr. Burns was the General Council and would negotiate for all Respondents. Mr. Burns was not an attorney of record nor had he filed a pro hac vice. The Petitioner also pointed out to the court that Mr. Burns did not show anywhere that he had obtained the permission of all the Respondents to negotiate a settlement. Mr. Mollica in his Memorandum in Opposition claimed "that all the Defendants will proceed and act collectively under Burns' direction." By this statement it would be reasonable assume that Mr. Burns had already obtained permission from all Respondents for Mr. Burns to represent them.

When the Respondent Dr. Hayes was deposed on June 13, 2003 he was specifically asked (page 5 line 6.) "So, does John Burns have your permission to make decisions regarding settlement of this case?" Dr. Hayes' response was "No" (page 6 line 8). Mr. Mollica and Dr. Hayes were given the opportunity to change this testimony after the deposition but the option was waived by Mr. Mollica. Had Mr. Mollica told the truth to the court that Mr. Burns did not have permission to negotiate for all Respondents the court may have ruled differently on the default judgment motion and granted it instead of sanctioning the Petitioner for filing a frivolous motion. So again Mr. Mollica was not telling the truth when in his Memorandum in Opposition that all the Respondents will precede and act collectively under Burns direction (App. 9 & 16-19).

There is other evidence that the Petitioner would have presented to show that the Respondent was not truthful in statements given under oath. If the Petitioner was given the opportunity in court the Petitioner could have presented this evidence to a jury. The Petitioner was denied Due Process.

4) Whether the Court of Appeals for the Sixth Circuit erred when it failed to address the Breach of Contract Issue.

The Respondents and the court have failed to address the Breach of Contract issue (App. 13-15). Petitioner Cites:

> When a student enrolls in a university or college, pays his tuition and fees, and attends classes, the resulting relationship may reasonably be construed as being contractual in nature: Behrend v. State of Ohio, 55 Oapp2d 135, 9 003d 280, 379 NE2d 617.

The Petitioner enrolled, paid tuition and fees, and attended classes at Ohio University, therefore a contract existed. Ohio University has maintained that its written policies abide by FERPA and Section 504 of the Rehabilitation Act. In fact, Ohio University Policy Procedure No. 12.020 includes a page which is a FERPA compliance statement that must be signed by individuals that control student records. Since instructors employed by Ohio University control student records, one would assume the instructors would have to sign the FERPA compliance form. The contract was breached when the University failed to abide by its policy to comply with Section 504 of the Rehabilitation Act, and FERPA. The contract was also breached when the Respondents failed the Petitioner in Latin 113 before the Petitioner attended class. Additionally, the contract was breached when Dr. Hayes failed to comply with the syllabus for Latin class, 100 level, by adding extra chapters from a higher 200 level series after the class started. The Respondents failed to comply with FERPA per Ohio University policy and breached the contract when Dr. Andrews and Dr. Hayes discussed Petitioners' Learning Disability without Petitioner's consent. Had the Respondent answered the admissions truthfully these admissions could have been submitted to show just cause for a contract breach and could have been presented with the Response to the Motion to Dismiss. Due Process was denied.

5) Whether the Court of Appeals for the Sixth Circuit erred when it ruled that the Petitioner does not have a private right of action (App. 18-21).

The Petitioner does have a private cause of action. The Honorable Judge George C. Smith Ruled that there is no private right of action under FERPA, Gonzaga Univ. v. Doe, 536 US 273, 287 (2002). In the Gonzaga Univ. v. Doe case,

Doe was suing the University for a policy that was in violation of FERPA which discriminated against a student. In Petitioner's case the Ohio University policies are in compliance but the individuals that enforce the policy are in violation. Because the Respondent Ohio University has a policy to comply with FERPA and there is a contract between Ohio University and the Petitioner, it is not relevant if there is no right of action under FERPA alone. There is a right of action under Breach of Contract. The Respondents did not comply with FERPA. Not only is this a violation of FERPA but also a violation of Breach of Contract between the Petitioner and the University. Also in the Gonzaga case Doe sued Gonzaga for violations of Washington tort and contract law as well as for violations of FERPA. The Supreme Court of Washington reversed the Court of Appeals in Pertinent Part and had ordered the reinstatement of the FERPA portion of the damages awarded. On certiorari, the United States Supreme Court reversed the FERPA issue and remanded the case. Other issues including the tort and contract issue were not reversed.

6) Whether the Court of Appeals for the Sixth Circuit has subject matter jurisdiction with respect to Respondent Ohio University and the other Respondents (App. 18-21).

The Court does not lack subject matter jurisdiction with respect to Respondent Ohio University. The Court has subject matter jurisdiction under ADA, Section 504 of the Rehabilitation Act, Breach of Contract and FERPA. Accordingly, Ohio University is a public entity receiving federal funds and as such is subject to the previous stated laws. Per Ohio University's policy:

> "The Ohio University Office for Institutional Equity is responsible for developing,

> cultivating, encouraging, and supporting positive programs designed to increase tolerance and value diversity."

Additionally per Ohio University's policy:

> "Ohio University is committed to providing opportunities for qualified disabled persons in education, employment, and promotion by means of reasonable accommodation. Further, while the University carries out its policies of program accessibility, the elimination of architectural and attitudinal barriers will be vigorously pursued."

Finally, Ohio University does not commit to their own policy, which states:

> "...insuring equal opportunity for students with disabilities. This process is a collaborative effort between the Disability Student Services Office, students and faculty members. All three participants have a role to play in making education accessible. Understanding your rights as well as your responsibilities are essential to the process of accommodation."

In light of the above, Ohio University is admitting subject matter jurisdiction under the above-mentioned laws. Thus, the Court does not lack subject matter jurisdiction with respect to Respondent Ohio University. Furthermore, the court also has subject mater jurisdiction under Title 18, United States Code; § 1001 which makes it a crime to

provide false information to a federal court. Providing false information denies the Petitioner the right to Due Process.

7) Whether the Court of Appeals for the Sixth Circuit erred when it ruled for the Respondent's motion to dismiss because States are not subject to the Americans with Disabilities Act. And whether the Court of Appeals for the Sixth Circuit erred when it failed to address the individual Respondents: Dr. Robert Glidden, Dr. James Andrews, Dr. Steve Hays, Dr. William Owens, and Kathy Fahey who are not immune from liability under the eleventh amendment (App. 18-21).

The individual Respondents: Dr. Robert Glidden, Dr. James Andrews, Dr. Steve Hayes, Dr. William Owens, and Kathy Fahey are not a State and are not immune from liability under the Eleventh Amendment. The Honorable Judge George C. Smith ruled that Ohio University is a State Institution and that States are not subject to the Americans with Disabilities Act, Board of Trustees of the University of Alabama v. Garrett, 531 U. S.356-67 and 347 (2001).

The Sixth Circuit court in 2002 did considered Garrett in deciding Carten v. Kent State University,282 f.3d 391 (6th CIR). Even so, it ruled:

> In Nihiser v. Ohio EPA,269 f.3d 626 (6th CIR.2001), this court concluded that Ohio unambiguously waved Eleventh Amendment immunity against Rehabilitation Act Claims when it agreed to accept federal funds pursuant to that Act.

It further ruled:

> In light of this Court's decision in Nihiser, we find that Carten's Rehabilitation Act claim agains KSU and the Doctors in their official capacities is not barred.

Therefore, the Respondents do not have Eleventh Amendment immunity. The Respondents were not following the policies of Ohio University in their capacity as employees of the state. As such, their immunity was compromised. Accordingly in Stump v. Sparkman, 435 U. S. 349, "A judge's immunity from liability only exists to the extent that the judge is doing the work of the court. If it can be proven that an act of a judge was outside his judicial role then his judicial immunity is compromised." Just like a Judge, the Respondents Dr. Steven Hayes and Dr. James Andrews must comply with FERPA to be immune from liability. Also just like the Judge, Dr. Steven Hayes, Dr. William Owens, Dr. Robert Gillen, and Kathy Fahey, must comply with Section 504 of the Rehabilitation Act to be immune from liability.

ADA states, "A state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." Additionally, Section 504 of the Rehabilitation Act states, "A state shall not be immune under the Eleventh Amendment of the Constitution of the United Sates from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973... or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." In light of this, all Respondents are not immune from liability under ADA and Section 504 of the Rehabilitation Act. Additionally, 34 CFR Section 104.31 states that schools generally should conform to Section 504 by following IDEA. No immunity under the Eleventh

Amendment exists under IDEA. Thus Respondents' immunity claim has no merit.

In this case if the suit was allowed to be dropped there would be nothing to prevent the Respondents from continuing to violate Section 504 of the Rehabilitation act. There would be nothing to prevent the University leaders from dereliction of their duties, allowing further violations from other instructors. Nothing would prevent the professors from revealing students grades, handicaps and other educational records. There are policies in place at Ohio University that address discrimination. The University leaders and professors must be held responsible for their actions and not be immune from liability. It serves no constructive purpose to have laws such as ADA, Section 504 of the Rehabilitation Act and FERPA if everyone could claim immunity under the Eleventh Amendment. A person must be able to seek relief. The Eleventh Amendment was enacted so that individuals could do their job, not use it as a "Get out of Jail Free" card when they fail to comply with laws, rules and regulations. To allow immunity would defeat the purpose of having laws because there would be no way to enforce them and deny the Petitioner Due Process.

8) Whether the Petitioner's Complaint states a claim upon which relief can be granted (App. 18-21).

The Petitioner's Complaint does state a claim upon which relief can be granted. Under 42 U.S.C., Chapter 21, Subchapter IV, Section 2000c-8 Personal suits for relief against discrimination in public education states:

> Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

The Petitioner claimed discrimination because of a learning disability, which is covered by section 504 of the Rehabilitation Act and again a breach of contract. This caused the Petitioner harm by denying the Petitioner a degree in Physics, humiliation in a classroom and added expenses to retake the class including room and board and tuition. This is a claim upon which relief can be granted. Due Process was denied.

9) Whether the court erred when it denied the Petitioner's Motion for Judgment by Default and Response to Respondents Answer and Jury Demand filed on Nov. 26, 2002.

The Petitioner filed a motion for Default Judgment on November 26, 2002, in that the Respondents failed to answer the complaint within the 20-day rule [Rule 12 (a) (1) (A)]. The Respondents answered the complaint on November 7, 2002, which is 45 days from the date of the summons (September 23, 2002). However, [under Rule 12 (a) (4)] the court ruled that the "Defendants answer had to be served no later than November 12, 2002". (App. 7-8)

The Respondents' Motion to Dismiss does not fall under Federal Rules of Civil Procedure 12 (a) (4). The Respondents' motion was not a request for a dismissal for "improper venue" but rather a request to have the "claim pursued in the appropriate venue" (App. 5-6). According to Federal Rules [Rule 12 (a) (4)] a motion may be filed to dismiss for improper venue not to request to change venue. The request to change venue should not exclude the Respondents from the 20-day rule. After all, the Respondent Attorney, Mr. Mollica, does ask to have the "claim pursued in the appropriate venue". Therefore, this change of venue request was made out of order [Rule 26 (f) Report of Parties].

In light of the above, the Respondent's Motion to Dismiss for venue change was used as a tool to cause an unnecessary delay of the proceedings. To allow improper motions in lieu of a response to a claim would be nothing more than a delaying mechanism to circumvent the rules [Rule 11 (1)]. The Respondent would never have to respond to the Petitioner's complaint. A complaint would never be heard if the Respondent was permitted to file improper motions. The Respondents' improper motions caused unnecessary delay and should be construed as frivolous. Since the Petitioner is Pro Se, it is imperative that the courts apply the rules to everyone. Therefore, sanctions should be imposed by the Court's own initiative [Rule 11 (1) (B)]. Although the Local and Federal Rules of Civil Procedures must be applied to both the represented and to Pro Se litigants, it is crucial to maintain justice and avoid prejudices see Haines v Kerner, 404 U.S. 519, 520 and Maduakolam v. Columbia University, 866 F.2d 53. "pro se litigants are held to a less stringent standard than pleadings drafted by attorneys". The Petitioner was denied Due Process.

10) Whether the court erred when it denied the Petitioner's Motion for Default Judgment and Petitioner's Request for a Protective Order filed on February 7, 2003, and March 3, 2003.

The Petitioner filed a Default Motion on February 7, 2003, and Protective Order on March 3, 2003, in that Mr. John Burns misrepresented himself and failed to identify himself as an attorney of record or file pro hac vice [Local Rule 83.4, 83.5 (d), 83.5 (e), and Federal Rule 55]. The court ruled this as a frivolous motion (App. 9 & 16-17).

On December 30, 2002, a case conference meeting [Fed. R. Civ. P. 26 (f)] was held with Mr. Andrew Mollica, Attorney of Record for the Respondents; Mr. John Burns,

client; and John Bevington, Pro Se Petitioner present. At the December 30, 2002, meeting Mr. John Burns identified himself as "the client", however was later identified as the University's General Counsel in Mr. Mollica's Jan 10, 2003, e-mail. In light of Mr. Burns stating he was the client and later was identified as General Counsel for the Respondents, he was misrepresenting himself to the Petitioner. Mr. Burns is not an attorney of record. Mr. Burns is not a permanent bar of the court. Mr. Burns has not filed Pro Hac Vice, nor has anyone filed with the Court and service on all other parties a notice of a substitution of trial attorney [Rule 83.5 (e)]. Under Rule 83.4 it is imperative that all counsels are recognized to both the court and the opposing party. It was improper for Mr. Burns to participate in a settlement for the Respondent and act in the capacity as the Respondents' attorney. To do so would be the unauthorized practice of law (UPL). The California Supreme Court in 1998 in Birbrower v Superior Court, ruled that an in house lawyer was ruled UPL because he failed to file for pro hac vice. Additionally, in the United States District Court for The Eastern District of Virginia United States v. Zacarias Moussaoui Crim No. 01-455-A, the Government's Response indicates that the Lawyer Mr. Freeman, when it comes to practicing Law in the court, needs to apply for pro hac vice.

At the December 30, 2002, meeting Mr. Mollica refused to participate in a settlement, or otherwise defend his clients, Ohio University, Dr. Steve Hayes, Dr. James Andrews, Dr. Robert Glidden, Dr. William Owens, and Ms. Kathy Fahey. As such, Mr. Mollica violates Federal Rule 55 Section A.

Mr. Burns was participating in the Case Conference and negotiating a settlement and acting in the capacity as the attorney of record for the Respondents and to do so was practicing law in this court's jurisdiction. See Eley v. Miller, 7Ind. App. 529 [34 N.E. 836]. The Respondent never

denied that Mr. Burns was not a member of this court's permanent bar nor has Respondent denied that Mr. Burns had not filed pro hac vice. Since the Respondent does not deny this allegation the Petitioner does not have to provide evidence, Federal Rule 8 (d) Effect of Failure to Deny. Based on the e-mails provided, the lack of denials from Respondent, failure to comply with Local and Federal Rules of Civil Procedure and case law, Mr. Mollica's refusal to defend his clients, and Mr. Burns' UPL, are sufficient facts that support Petitioner's Default Motion and Protective Order request.

The Petitioner executed his right to file a motion for Default Judgment. The Petitioner has shown a valid legal basis for his motion. Through Local Rule 83.4, 83.5 (d), 83.5 (e) the Petitioner has shown that Mr. Burns was not the attorney of record. Federal Rule 55 does apply since Mr. Mollica, the attorney of record, refused to negotiate at the case conference; therefore, there was no legal representation. The Petitioner's motion and Protective Order request had a valid legal basis, a valid reason, posed no undue burden on the Respondent, was not filed for an improper purpose, and was not frivolous. Thus, the motion and protective order should not have been ruled frivolous.

In the order dated April 3, 2003 (App. 16-17), Judge George C. Smith stated that the "Respondents are not in default, and Bevington has made no argument and offered no facts that would support the entry of default or default judgment under Rule 55 (a) and (b), Federal Rules of Civil Procedure." Given all of the above, this statement holds no water and is contrary to all existing rules and laws. Judges, Attorneys, and Courts' attitudes towards Pro Se litigants are supposed to be fair-minded and make unbiased decisions, not be demeaning or hostile. The constitution guarantees individuals the right to represent themselves. The Petitioner is a Pro Se litigant who is applying the rules and laws. The

Petitioner does have the right to represent himself and be treated with respect and fairness. To do anything to the contrary would be an injustice to the entire judicial system and the Constitution and deny Due Process.

11) Whether the court erred when it sanctioned the Petitioner per the order dated April 20, 2003 (App. 9 & 16-17).

In the April 3, 2003, order (App. 16-17) Judge Smith had denied the Petitioner's Feb. 7, 2003, default motion as being frivolous. Subsequently the Judge sanctioned the Petitioner and fined him $150.00 per the order dated April 20, 2003 (App. 9).

Judge Smith's April 30, 2003, order stated, "Bevington had absolutely no grounds for moving for default judgment against Defendants.... Bevington advances no legal grounds supporting his motion for default judgment against them." The default motion filed by the Petitioner does not warrant sanction under Rule 11 because it was not presented for any improper purpose, the claims, defense, and other legal contentions therein are warranted by existing law, the allegations and other factual contentions have evidentiary support and the denials of factual contentions are warranted on the evidence. Petitioner's default judgment motion was filed with just cause, with a valid legal basis, facts, evidence, and supported by Local Rules 83.4, 83.5 (d), 83.5 (e) and Federal Rule 55, 55 (a), 55 (b), United States District Court for the Eastern District of Virginia United States v. Zacarial Moussaoui Crim. No. 01-455-A, Birbrower v. Superior Court, Eley v. Miller, 7Ind. App. 529 [34 N. E. 836], U S District court Southern district of Ohio Eastern Division Order No. 01-1, General Order on Pretrial, Section II Fed. Rules 26(f), Fed Rule 16(b), Section V, and the Introductory

Statement on Civility in Local rules item 3. Due Process was denied.

At the Dec 30, 2002, meeting John Burns initially identified himself as the client and later was identified as legal counsel for all of the Respondents. Mr. Burns is not a permanent member of this court nor has he filed pro hac vice. According to Local Rule 83.4 the permanent bar of this court shall consist of those attorneys currently admitted and since Mr. Burns is not a permanent member of this court, has not filed pro hac vice, and was practicing in the capacity as legal counsel for the Respondents then Mr. Burns could be charged with the unauthorized practice of Law (UPL). See United States v. Zacarial Moussaoui Crim. No. 01-455-A and Eley v. Miller 7Ind.App. 529 [34 N.E. 836].

Additionally, Fed Rule 55 does apply since Mr. Mollica, the attorney of record, refused to negotiate at the Dec. 30, 2002, case conference than there was no legal representation. The Petitioner has shown reasons for this motion: the failure of Mr. Mollica to negotiate and the frivolous negotiations of an unauthorized representative (UPL). This failure to bargain in good faith brings about a failure to comply with U S District Court Southern District of Ohio Eastern Division Order No. 01-1, which is grounds, in itself for Default Judgment. The response by the Defense counsel, Mr. Mollica, other than complaining about it was one paragraph that required no research (only minutes of his time) so no undue burden was placed on him. The default motion had a valid legal basis, a valid reason, posed no undue burden, and was not frivolous. Therefore, the Petitioner should not have been sanctioned under Rule 11. See Haines v Kerner, 404 U.S. 519, 520 and Maduakolam v. Columbia University, 866 F.2d 53. "Pro se litigants are held to a less stringent standard than pleadings drafted by attorneys".

Once again, the constitution guarantees individuals the right to represent themselves. To have a court/judge flagrantly disregard all the facts, rules, laws, and evidence and sanction a Pro Se litigant with no basis is treating the judicial system as a joke and displaying a bias towards pro se litigants. Due Process was denied.

CONCLUSION

The Sixth Circuit erred when it affirmed the ruling of the District Court. The motion to dismiss that was granted by the District Court was improper due to the fact that the motion was filed prematurely before discovery was completed. The moving party has not only delayed the answers to the interrogatories, but also provided false admissions. The motion was granted even though the depositions were not complete and discovery was still in process. The moving party is not entitled to a Judgment for Dismissal.

The there was a contract between the University and the Petitioner. The University's policy includes a contract that each holder of student records signs indicating that FERPA will be adhered to. Therefore, the Petitioner is entitled to a right of action under breach of contract. Additionally, Ohio University unambiguously waived Eleventh Amendment immunity against Rehabilitation Act Claims when it agreed to accept federal funds pursuant to that Act.

If the Respondents answered the Request for admissions truthfully, without delay, and discovery allowed to be completed, affidavits, deposition testimony and other evidence could have been provided to establish a genuine

issue of material factual basis for Petitioners' claim. Therefore, this case should not have been dismissed and
For all the reasons stated above, the Petitioner respectfully requests that the ruling be overturned.

Finally, the Respondents' venue change motion was filed improperly and filed to cause delay. Therefore, the Petitioner respectfully requests that the ruling be overturned. The two default motions and the protective order were filed properly and should not have been dismissed. The Petitioner should have not been sanctioned. The Petitioner respectfully requests that the ruling be overturned and that the Petitioner be reimbursed for the $150.00 fine.

I respectfully plead that the Court grant writ of certiorari to review the decision of The United States Court of Appeals for the Sixth Circuit., and that judgment be reversed in favor of the Petitioner consistent with my constitutional rights.

Respectfully Submitted,

John Bevington, Petitioner
1611 St. Rt. 60
Ashland, Ohio 44805
(419)-289-2113

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John P. Bevington, Petitioner,	§	
	§	Case No. C2-02-1064
v.		
	§	Eastern Division Order
Ohio University, et al., Respondents,	§	No. 01-2

(Filed January 8, 2001)

GENERAL ORDER ON SETTLEMENT WEEK

The United States District Judges for the Southern District of Ohio, Eastern Division, adopt the following general provisions to be applicable in the conduct of Settlement Week. This order is intended to supplement the provisions of Local Rule 16.3 and to replace Section IV of Eastern Division 91-4, which has been superseded by Eastern Division Order 01-1

I. SETTLEMENT WEEK COORDINATOR

The United States Magistrate Judge selected as ADR Coordinator pursuant to Local Rule 16.3 (d)(1) shall, in addition to the duties set for the in that Rule, be the Settlement Week Coordinator, and shall be responsible for insuring that the procedures for appointing and training neutral mediators for

Settlement Week are developed and promulgated as required by 28 U.S.C. § 653. The Coordinator shall develop written procedures to be followed by clerical and administrative personnel which will insure the efficient operation of the Settlement Week program.

II. SELECTION OF CASES FOR SETTLEMENT WEEK AND ASSIGNMENT OF MEDIATORS

Each United States Magistrate Judge shall be primarily responsible for selection those cases from his or her docket which should be mediated during any specific Settlement Week. Counsel may also request that a case be mediated during a specific Settlement Week. Mediators will be assigned to each such case based on procedures to be developed by the Settlement Week coordinator and agreed to by the Magistrate Judges. Clerical assistance needed by the Magistrate Judges in order to implement the assignment of cases to Settlement Week and the selection of mediators shall be provided primarily by the Magistrate Judges' secretaries, administrative assistants, courtroom deputies, and other Clerk's office personnel, who shall also provide information and assistance to the mediators.

III. SETTLEMENT WEEK MEDIATION PROCEEDINGS

In order to maximize the likelihood of meaningful settlement negotiations at the Settlement Week conference, and unless otherwise ordered by a District or Magistrate Judge:

A. The trial attorney and principal for each party shall attend the conference in person.

B. The parties shall exchange fully-documented written settlement demands and offers prior to the conference, with the demand being due at least two weeks before the date selected for the conference, and the response not less than one week before that date.

C. A party may be excused from compliance with the provisions of this General Order or any other Settlement Week order only upon motion made to the Magistrate Judge, in writing or in a telephone or in-person conference, at an appropriate time prior to the conference. Any such motion must be accompanied by a statement that the movant has conferred with opposing counsel and a statement of the reasons for the requested continuance. If the continuance is being requested based on the lack of discovery or disclosures, the movant shall state, or be prepared to state, when it is reasonably anticipated that such discovery or disclosures will be completed and when the case will be ready for a mediation conference. Any written motion for a continuance must be served on the moving counsel's client. The Magistrate Judges, or the assigned District Judge, may impose sanctions, as permitted by law, for noncompliance with the General Order or with other orders relating to Settlement Week.

/s/ James L. Graham, JUDGE
UNITED STATES DISTRICT COURT

/s/ George C. Smith, JUDGE
UNITED STATES DISTRICT COURT

/s/ Edmund A. Sargus Jr., JUDGE
UNITED STATES DISTRICT COURT

/s/ Algenon L. Marbley, JUDGE
UNITED STATES DISTRICT COURT

/s/ Joseph P. Kinneary, SENIOR JUDGE
UNTIED STATES DISTRICT COURT

/s/ John D. Holschuh, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

John P. Bevington, Petitioner,	§	
	§	Case No. 1 : 02 CV 1843
v.	§	Judge Ann Aldrich
Ohio University, et al., Respondents,	§	

(Filed October 24, 2002)

ORDER OF TRANSFER

On September 19, 2002, plaintiff pro se John P. Bevington filed this action against Ohio University and five of its employees. The complaint asserts claims under the Americans with Disabilities Act. The Rehabilitation Act of 1973, and the Family Educational Rights and Privacy Act.

Review of the complaint indicates the specific events and omissions of which plaintiff complains occurred in Athens, Ohio, where all the defendants are located. Athens is located in the Southern District of Ohio. Therefore, the Southern District of Ohio is the only proper venue for this matter. 28 U.S.C. § 1391(b).[1]

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[1] Title 28 U.S.C. § 1391 (b) provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim ...

Accordingly, pursuant to 28 U.S.C. § 1406 (a), this matter is hereby transferred to the United States District Court for the Southern District of Ohio. [2] The court certifies that an appeal from this decision could not be taken in good faith.[3]

IT IS SO ORDERED.

/s/ Ann Aldrich, JUDGE
UNITED STATES DISTRICT COURT

... occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

[2] 28 U.S.C. § 1406 (a) provides:
The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

[3] 28 U.S.C. § 1915 (a) (3) provides:
An appeal may not be taken in forma pauperis if the trial court certifies that it is not taken in good faith.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John P. Bevington, Petitioner,	§	
	§	Case No. C2-02-1064
v.		
	§	Judge Smith
Ohio University, et al., Respondents,	§	Magistrate Judge Abel

(Filed January 9, 2003)

ORDER

Plaintiff John P. Bevington's November 26, 2002 motion for judgment by default (doc.12) is DENIED.

Bevington filed this suit in the United States District Court for the Northern District of Ohio. Defendants timely filed a motion to dismiss based on improper venue. On October 24, 2002, Judge Aldrich issued a decision transferring the case to this Court. Defendants served their answer on November 7, 2002. Under the provisions of Rule 12(a)(4), Federal Rules of Civil Procedure, when the Court denies a motion filed in response to a complaint, "the responsive pleading shall be served within 10 days after notice of the court's action ...." Defendants' counsel states that he received notice of Judge Aldrich's decision on October 28, 2002. Because the period of time prescribed by Rule 12 (a)(4) is ten days, intervening Saturdays, Sundays, and legal holidays are not included in the calculation of the time defendants had to respond to the complaint. Rule 6(a),

Federal Rules of Civil Procedure.[1] Thus, Defendants' answer had to be served no later than November 12, 2002. The certificate of service on the answer states that it was served November 7, 2002. The Clerk of Court caused the answer to be filed on November 12, 2002. Consequently, defendants are not in default.

Plaintiff John P. Bevington's November 26, 2002 motion for judgment by default (doc.12) is **DENIED**.

/s/ George C. Smith, JUDGE
UNITED STATES DISTRICT COURT

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[1] Rule 6(a) provides, in relevant part:
When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John P. Bevington, Petitioner,	§	
	§	Case No. C2-02-1064
v.		
	§	Judge Smith
Ohio University, et al., Respondents,	§	Magistrate Judge Abel

(Filed April 30, 2003)

ORDER

In response to the Court's April 3, 2003 Order that he show cause why he should not be sanctioned for having filed a frivolous motion for default judgment, John P. Bevington states that Ohio University's General Counsel John Burns responded to his settlement demand in a way that displeased him. Bevington had absolutely no grounds for moving for default judgment against defendants. Defendants have answered, and they have been actively defending this lawsuit. Bevington advances no legal grounds supporting his motion for default judgment against them.

According, plaintiff John P. Bevington is sanctioned $150 for filing the frivolous February 7, 2003 motion for default judgment. Bevington is **ORDERED to pay $150 to the Clerk of Court within thirty (30 days of the date of this Order**.

/s/ George C. Smith, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John P. Bevington, Petitioner, Plaintiff	§	
	§	Case No. C2-02-1064
v.		
	§	Judge Smith
Ohio University, et al., Respondents, Defendants	§	Magistrate Judge Abel

(Filed February 11, 2003)

PRELIMINARY PRETRIAL ORDER

A preliminary pretrial was held February 6, 2003. Counsel for all parties appeared.

Venue is proper in the Southern District of Ohio, Eastern Division. This case was transferred here from the United States District Court for the Northern District of Ohio. Jurisdiction is alleged under FERPA, the ADA, and the Rehabilitation Act. Any motion for leave to amend the pleadings and/or to add defendants must be filed on or before **April 1, 2003.** Any motion challenging subject matter jurisdiction must be filed on or before **June 2, 2003**. There are no present amendments to the pleadings. The parties will remain as pleaded.

The complaint alleges that defendants discriminated against plaintiff John Bevington because of his disability: Attention Deficit Hyperactivity Disorder. Defendant Steven Hayes gave Bevington a D- in Latin 112 and told him he would fail Latin 113 before he took it. The complaint further

alleges that defendants failed to comply with FERPA when they discussed plaintiff's disability without his consent.

Plaintiff sought additional time to take examinations and consideration of the impact of his learning disability on his spelling. Plaintiff seeks a B.S. in physics. Because of his grades in Latin, plaintiff has not met the language requirements for a B.S. in physics.

Among other defenses, the answer pleads that this Court lacks subject matter jurisdiction over plaintiff's claims. Defendants offered plaintiff the opportunity to retake the classes.

No expert testimony is anticipated.

Under the provisions of Rule 26(e)(2), Fed. R. Civ. P., counsel are under a duty "seasonable to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other party during the discovery process or in writing." Counsel are DIRECTED to review their clients' responses to written discovery on or before **August 29, 2003**, and promptly make any supplemental disclosures required by Rule 26(e)(2).

All discovery must be completed by **October 1, 2003.** Case-dispositive motions must be filed on or before **December 19, 2003**. counsel must make the disclosures required by Rule 26(a)(3), Fed. R. Civ. P. no later than **30 days prior to the date noticed for the final pretrial conference**. Alternatively, by agreement, the parties may choose to make their Rule 26(a)(3) disclosures in the final pretrial order.

The parties will participate in the **September 2003 Settlement Week.**

/s/ Mark R. Abel
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

John P. Bevington, Petitioner,	§	
	§	Case No. C2-02-1064
v.		
	§	Judge Smith
Ohio University, et al., Respondents,	§	Magistrate Judge Abel

(Filed June 25, 2003)

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to Order dated June 25, 2003 the Court grants defendants' motion to dismiss. Case dismissed. Judgment for defendants.

Kenneth J. Murphy, Clerk
/s/ By Lisa Wright, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John P. Bevington, Petitioner,	§	
	§	Case No. C2-02-1064
v.	§	Judge Smith
Ohio University, et al., Respondents,	§	Magistrate Judge Abel

(Filed June 25, 2003)

ORDER

Plaintiff John P. Bevington brings this action alleging that defendants discriminated against him because of his disability. This matter is before the Court on defendants' June 2, 2003 motion to dismiss.

Complaint. The complaint alleges that John P. Bevington has an attention deficit hyperactivity disorder. It alleges that defendant Steven Hayes gave Bevington a D- in Latin 112 and told him he would fail Latin 113 before he took it. The complaint further alleges that defendants failed to comply with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g when they discussed his disability without his consent.

Bevington sought additional time to take examinations in consideration of the impact of his learning disability on his spelling. He is working towards a bachelor of science degree in physics. The complaint alleges that

because of his grades in Latin, Bevington has not met the language requirements for that degree.

FERPA. There is no private right of action under FERPA. *Gonzaga University v. Doe*, 536 U.S. 273, 287 (2002).

Americans With Disabilities Act. Ohio University is a State institution. The states are not subject to the Americans with Disabilities Act. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 365-67, and 374 (2001). No claim is pleaded here under the Rehabilitation Act.

For the reasons set out above, defendants' June 2, 2003 motion to dismiss (doc. 26) is **GRANTED.** The clerk of Court is **DIRECTED to enter JUDGMENT for defendants. This action is hereby DISMISSED.**

/s/ George C. Smith, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John P. Bevington, Petitioner, § Case No. C2-02-1064

v. § Judge Smith

Ohio University, et al., Respondents, § Magistrate Judge Abel

(Filed April 3, 2003)

ORDER

Plaintiff John P. Bevington brings this action alleging that defendants discriminated against him because of his attention deficit hyperactivity disorder. This matter is before the Court on Bevington's February 7, 2003 motion for default judgment (doc.17). The motion is denied as frivolous.

Defendants are not in default, and Bevington has made no argument and offered no facts that would support the entry of default or default judgment under Rule 55(a) and (b), Federal Rules of Civil Procedure. Basically he is disputing the role that the University's Director of Legal Affairs/General Counsel John Burns is playing in this case.

Communications between defense counsel, Mr. Burns, and the named defendants are privileged; and Bevington has no right to inquire into what communications Burns has made to the individual defendants concerning this settlement demands. Burns and Defense counsel have

communicated the university's settlement position to Bevington. He is free to reject the University's offer, but he is not free to file a motion designed to cause defendants additional expense because he does not like their settlement position.

John P. Bevington is **ORDERED** to **SHOW CAUSE within fifteen (15) days of the date of this Order** why he should not be sanctioned for filing a frivolous motion. The Court has limited resources. It is a violation of Rule 11, Federal Rules of Civil Procedure, for a party to file a motion for an improper purpose. Bevington should explain in his response to the Show Cause Order why the motion should not be viewed as filed for the improper purpose of causing defendants the expenditure of additional monies and time to respond to a wholly frivolous motion.

/s/ George C. Smith, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-4031

John P. Bevington,
Petitioner – Appellant

v.

Ohio University, et al.,
Respondent – Appellees

(Filed March 18, 2004)

Before: COLE and GILMAN, Circuit Judges; *SCHWARZER, District Judge*

John P. Bevington, proceeding pro se, appeals a district court judgment dismissing his disability discrimination action filed pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; the American with Disabilities Act (ADA), 42 U.S.C. §§ 701-7961. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On September 19, 2002, Bevington filed a complaint against Ohio University, and the following Ohio University officials: President Robert Glidden, Associate Professors James Andrews and Steve Hays, Department of Classics Chairperson William Owens, and Disability Services Employee Kathy Fahey. Bevington alleged that the

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* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

defendants discriminated against him because he is disabled, having been diagnosed with the learning disability of attention deficit hyperactivity disorder.

Bevington alleged that he is an Ohio University student majoring in physics and mechanical engineering. According to Bevington, he is obligated to fulfill certain foreign language requirements in order to obtain a physics degree. Bevington alleged that he enrolled in Beginning Latin 111 and 112, and that Andrews and Hays were the instructors for those classes. According to Bevington, both Andrews and Hays were informed of his disability and were provided a "letter of accommodations." However, Bevington alleged that Hays refused to accept his disability and discriminated against him on account of it by changing "the class assignments [sic] and syllabus to reflect a higher advanced level of Latin," by "changing the final exam for Latin 112 to include chapters 15 thru 28 instead of chapters 19 thru 28 as outlined on the Latin 112 and 113 syllabus," and by administering a three-hour final examination instead of a two-hour final examination. Bevington also alleged that he received a "D-" for Latin 112 and that Hays informed him that he "would not pass Latin 113" before he took that class. Bevington alleged that he subsequently failed Latin 113 and, as a result, he was unable to complete his foreign language requirement in order to obtain a physics degree. As relief, Bevington sought an "A" for Latin 111, 112, and 113, $100,000 from each defendant, and "reimbursement for any and all expenses incurred due to not graduating."

The defendants filed a motion to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(6), to which Bevington responded. The district court granted the defendants' motion and dismissed the case. Bevington has filed a timely appeal.

We review de novo the district court's dismissal of a suit pursuant to Fed. R. Civ. P. 12(b)(6). *James v Meow Media, Inc.*, 300 F. 3d 683, 689 (6th Cir. 2002), cert. denied,

537 U.S. 1159 (2003); *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). When considering a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "[t]he district court must construe the complaint in a light most favorable to the plaintiff, accept all of the factual aggregations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Tatum*, 58 F.3d at 1109; *accord James*, 300 F.3d at 689.

Upon review, we conclude that the district court properly dismissed Bevington's complaint. Bevington's FERPA claim was properly dismissed because there is no private right of action under the FERPA. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002); *United States v. Miami Univ.*, 294 F.3d 797, 809 n. 11 (6th Cir. 2002). Bevington's ADA claim asserted against Ohio University, which is based upon equal protection principles, was properly dismissed because it is barred by the Eleventh Amendment. See *Carten v. Kent State Univ.*, 282 F.3d 391, 394-95 (6th Cir. 2002). In addition, Bevington may not maintain an action under the ADA against the individual defendants identified in his complaint. *See* 42 U.S.C. §§ 12131(1) and 12132.

Bevington's RA claim was properly dismissed because the complaint failed to allege a claim for relief under the RA. See 29 U.S.C. § 794; *Doherty v. S. Coll. Of Optometry*, 862 F.2d 570, 573 (6th Cir. 1988). First, the complaint contained no allegations that Ohio University discriminated against Bevington in violation of the RA. Instead, Bevington's aggregations were directed toward alleged actions taken by the individuals identified in his complaint. However, Bevington may not maintain an action under the RA against the individuals identified in his complaint because the RA does not impose liability upon individuals. 29 U.S.C. § 794(b); *Hiler v. Brown*, 177 F.3d 542, 547 (6th Cir. 1999). Second, assuming that Bevington is

handicapped within the meaning of the RA, that he is otherwise qualified for participation in Latin classes at Ohio University, and that Ohio University receives federal financial assistance, he did not allege or prove that he ahs been discriminated against solely because of his handicap. The alleged discriminatory actins were taken against all students enrolled in the Latin classes at issue, not just Bevington.

Bevington presented several additional arguments in his appellate brief. We have considered all of Bevington's arguments and conclude that they lack merit.

Accordingly, we affirm the district court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green,
Clerk